UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

DELORES COVELL BUTT, Plaintiff, vs. GREENBELT HOME CARE AGENCY, Defendant.	No. C01-0152-LRR **REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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This matter is before the court on the motion of the defendant Greenbelt Home Care Agency ("Greenbelt") for summary judgment. Greenbelt filed its motion, statement of material facts, appendix, and supporting brief on November 29, 2002. (Doc. Nos. 8, 9, 10 & 11, respectively) The plaintiff Delores Covell Butt ("Butt") filed a motion (Doc. No. 12) on December 4, 2002, seeking discovery pursuant to Federal Rule of Civil Procedure 56(f), for purposes of responding to Greenbelt's motion. On December 26, 2002, Chief United States Magistrate Judge John A. Jarvey denied the motion for discovery, and directed Butt to file her resistance to Greenbelt's motion by January 6, 2003. (Doc. No. 16) Butt filed a resistance to Greenbelt's statement of facts, a brief in support of her resistance to Greenbelt's motion, and a statement of disputed facts on January 8, 2003. [1] (Doc. Nos. 17, 18 & 19, respectively)

On January 16, 2003, Greenbelt filed a reply to Butt's statement of facts, a reply brief, and a supplemental appendix. (Doc. Nos. 21, 22 & 23, respectively) On February 13, 2003, Judge Linda R. Reade referred this matter to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the preparation of a report and recommended disposition of Greenbelt's motion for summary judgment. The court has reviewed all of the parties' filings, and finding this matter to be ready for decision, turns to consideration of the issues raised by Greenbelt in its motion.

[1] Butt did not seek an extension of the deadline to file her resistance, nor did she seek leave of court to file her resistance past the deadline established by the court. Because this matter is before the undersigned solely for purposes of Greenbelt's motion for summary judgment, the undersigned may be unaware of oral requests for extensions of time, or oral agreements between the parties, that would justify Butt's late filing. Further, Greenbelt has not raised Butt's failure to file a timely resistance or requested any relief due to the late filing. Accordingly, the court will consider Butt's resistance to be timely filed.

I. INTRODUCTION

Butt brings this action under the Age Discrimination in Employment Act, 29 U.S.C. § 623, *et seq*. ("ADEA"); the Americans With Disabilities Act, 42 U.S.C. § 12101, *et seq*. ("ADA"); and the Iowa Civil Rights Act of 1965, as amended, Iowa Code chapter 216 (1997) ("ICRA"). She also bring a claim for retaliatory discharge. (*See* Complaint, Doc. No. 1.) Prior to filing this action, Butt exhausted the appropriate administrative remedies and obtained right-to-sue determinations from both the federal Equal Employment Opportunity Commission ("EEOC") and the Iowa Civil Rights Commission ("ICRC"). (*See* Doc. No. 1, Exs. A & B).

Butt was born August 4, 1931. She was hired as a home health care coordinator by the defendant Greenbelt Home Care Agency ("Greenbelt") on August 29, 2000, just a few weeks before her sixty-ninth birthday. She worked for Greenbelt for four months, until December 29, 2000, when she was fired. In this action, Butt claims she was terminated because of her age or disability, or both, in violation of the ADA, ADEA, and ICRA, and in retaliation for her complaints that she was being discriminated against. Butt seeks damages, interest, attorney fees, and costs of suit.

Greenbelt denies Butt's claims, arguing Butt was terminated due to ongoing problems with her job performance. Greenbelt further argues Butt has produced no evidence to support a finding that she is disabled or was subjected to discrimination, or that her termination was retaliatory.

II. FACTUAL BACKGROUND

The following facts are undisputed, except as otherwise noted. Butt is a registered nurse, licensed by the State of Iowa. (Doc. No. 1, ¶ 6) She received an Associate Degree in clinical nursing from the Iowa Methodist School of Nursing in Des Moines, Iowa, in 1971. She received a Bachelor of Science degree in nursing from the University of Dubuque

in 1979. Butt also has completed work at the University of Iowa toward a Master's degree in health education science.[2] She has held leadership positions in the Iowa Nurses' Organization, participated in forming the Iowa Hospice Organization, and served as a delegate to the National Hospice Organization. (Doc. No. 20, Ex. 4) From her resume, Butt appears to have considerable experience in both the practical and the administrative aspects of nursing. (*See id.*)

Butt responded to an advertisement and applied for a job with Greenbelt as a home health care coordinator. Greenbelt's administrator, Sheryl Kennedy, hired Butt on August 29, 2000. (Doc. No. 1, ¶ 10; Doc. No. 11, p. 1) Kennedy told Butt that the person who had held the position previously, Cindy Ellingson, was being promoted to a management position within Greenbelt's office. (Doc. No. 20, Ex. 1, p. 4) During her interview, Butt told Kennedy that she had bilateral knee prostheses. Butt explained to Kennedy that her knee prostheses "hadn't stopped [her] functioning at all," and she "didn't actually have any problems walking." (Doc. No. 20, Ex. 1, p. 6) Butt told Kennedy her lack of impairment due to her knee prostheses "was apparent because [she] was the only RN at the Rockwell Nursing Home with two wings and 50 patients." (*Id.*, pp. 6-7) Butt provided Greenbelt with a complete educational and employment history, and personal and professional references. (*Id.*, Exs. 4 & 14)

Butt and Kennedy also discussed Butt's age briefly during her employment interview. Butt made the comment, "I guess I'm probably the oldest nurse that you will have hired." (*Id.*, Ex. 1, p 4) Kennedy responded that she was not concerned about Butt's age. (*Id.*)

Kennedy hired Butt to cover the Ackley/Iowa Falls regional area, which required Butt to commute at least eighteen miles from her home on a regular basis. (*Id.*, Ex. 1, p. 4) Butt was to start out as a visiting nurse, providing home health care, and then become a

[2]Butt's *curriculum vitae* indicates she was a "Master's Candidate" from 1980-1981, but it is not clear whether she completed her post-graduate degree. (*See* Doc. No. 20, Ex. 4, p. 1)

coordinator when she demonstrated an "ability to perform the coordinator's traffic, which include[s] a lot of documentation, computer usage, being able to coordinate all the services that the particular client requires and knowing the resources available in the county." (*Id.*, Ex. 6, p. 5) Once Butt moved into the coordinator position, her job description was to include being "responsible for the total care of the client and all the services and the various levels of care that are provided to that client." (*Id.*, Ex. 6, p. 6) This included working with pharmacists, physicians, and therapists, to coordinate patient care. (*Id.*) Another nurse, Jill Harkin Silver, also was hired by Greenbelt for the Ackley/Iowa Falls region. Silver began working for Greenbelt on September 14, 2000, the day after her 23rd birthday. (*Id.*, Ex. 5, pp. 2, 5)

Pursuant to Greenbelt's policy, each new nurse is assigned a mentor. During a nurse's orientation period, the nurse follows the mentor on a few home visits, and then watches while the mentor completes paperwork and inputs information into the "Oasis" computer system. After observing these procedures a couple of times, the roles are reversed, and the mentor observes the nurse. (*Id.*, Ex. 6, pp. 34-36) The mentor serves as "the key person that the new orientee could go to for answers in regard to a number of things: How does she fill out her time sheet? When is it appropriate to fill out your documentation that you need to do for home visitation? What is included in a plan of treatment? Where are the maps for various areas of the county. . . ." (*Id.*, Ex. 6, p. 36)

Sharon Huston, an RN coordinator with Greenbelt, was assigned to serve as Butt's mentor during her orientation period. (*Id.*) At some point, Huston apparently told Kennedy she did not want to be Butt's mentor any longer. (*Id.*, pp. 40, 41)

On September 22, 2000, Kennedy received a memorandum from three of Greenbelt's home health coordinators (Huston, Kennedy, and a Tammy VanderLoop) regarding what they described as their concerns and observations arising from Butt's orientation, and listing the following eleven items:

1. Using the patient's bathrooms during a visit.
2. Using the Handicapped parking at Cedar Ridge & Eldora Clinic.
3. Great amount of difficulty walking up steps with & without a railing.
4. Inappropriately putting fingers on patients' mouths.
5. Not following infection control standards.
6. Lacks knowledge of heart and lung sounds.
7. Difficulty ambulating a distance of greater than 100 feet.
8. Unable to travel/ride with nurses with smaller cars.
9. Checking for edema - need to bend over[,] look & touch.
10. Ability to lift.
11. Hearing? – not always acknowledging what the patient says.

(Doc. No. 20, Ex. 17) A handwritten note on the bottom of the memorandum indicates Kennedy reviewed these items of concern with Butt on September 25, 2000. Kennedy noted she would "continue to monitor these areas with [Butt] during 6 mos. probationary period."[3] (*Id.*)

On October 19, 2000, Kennedy issued a written warning notice to Butt, in which Kennedy stated, *inter alia*:

> **The following serves as a disciplinary warning:**
> *Violation*. (1) Making derogatory remarks in front of HCA/client about his home and clothing. "Shouldn't be in this home," "Should throw clothes in garbage." (2) Making unprofessional remark to aide – "Have Fun."

[3]At the time Butt was hired, Greenbelt had a six-month probationary period for new employees. (Doc. No. 20, Ex. 6, pp. 9, 11) On this record, it is unclear whether Butt was subject to six months' probation (*see* Doc. No. 10, p. 37; Doc. No. 20, Ex. 17; Doc. No. 21, ¶ 3), or a shorter probationary period. A note in Butt's disciplinary records dated November 28, 2000, states her probationary period was being extended for 30 days, to December 28, 2000, tending to indicate she may have been subject to a 90-day probationary period. (*See* Doc. No. 20, Ex. 6, pp. 28-29) However, in either case, it is clear Butt was terminated within the applicable probationary period.

> *Follow up action taken.* [Butt] will be professional and non-discriminatory in her comments made to clients and home care aides. Please review Code of Ethics.

(Doc. No. 10, p. 46) The form indicates no disciplinary action was taken. (*Id.*)

In late October 2000, Butt complained to Gloria Peet, an administrative assistant, that "she was not being properly oriented, [and] was not getting the orientation that she needed to perform her job." (*Id.*, p. 31) Butt also complained that she was being harassed. On October 30, 2000, Butt met with Kennedy and Peet to discuss her complaints. One of the suggestions that came out of the meeting was to have Kennedy make some home visits with Butt. (Doc. No. 19, ¶ 11; Doc. No. 20, Ex. 6, p. 31) Kennedy did so, and observed, "By and large I thought [Butt] did a relatively good job." (Doc. No. 20, Ex. 6, p. 32)

Butt claims Greenbelt "began retaliating against [her] after the complaint, and continued to discriminate against her based on her age and disabilities" by issuing additional written warnings, and by Cindy Ellingson's refusal to train her on the Oasis computer system.[4] (Doc. No. 19, ¶ 13) Butt complains she personally observed Ellingson giving Ms. Silver "detailed training and assistance" in learning the computer system, but Ellingson repeatedly told Butt she did not have time to help her learn the system. (*Id.*, Ex. 3, ¶ 16) Ellingson voiced concerns to Kennedy about Butt's ability to learn the computer system. Kennedy stated in her deposition, "We were afraid that [Butt] would enter the computer and enter the system and possibly destroy some of the data that we have there." (*Id.*, Ex. 6, pp. 32-33) Butt complained to Kennedy that she was not receiving adequate training on the computer system. (*Id.*, Ex. 6, p. 36) Kennedy suggested Ellingson "work with [Butt] on the computer to provide additional training," (*id.*, p. 31), but Kennedy did not know if Butt received any additional training. (*Id.*, p. 33)

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[4] Ellingson was the person who previously held Butt's position, but was promoted to a management position.

On November 27, 2000, Sharon Huston and Cindy Ellingson prepared a memorandum to Kennedy regarding "Update on Training/Problems," in which they reported the following observations regarding Butt's performance:

> **Patient Coordinator Report:**
>
> Patient complains that [Butt] is very unsure of her assessment and acted like she didn't know what to do. Patient is not confident with her assessments. Other patients say she's nervous, not polite, and won't spend time discussing appropriate issues.
>
> Observed Delores filling out the Skilled Nursing Visit Notes before going to the patients for assessment.
>
> Did not look at a surgical wound on spinal area with last visit.
>
> Won't listen to instructions, won't follow instructions, argues with instructing RN, bosses, and criticizes.
>
> Does not use good time management. Time is unaccounted for.
>
> **Computer & Oasis Training Report:**
>
> [Butt] is argumentative. Does not follow instructions. The Oasis are incomplete. She has trouble with problem solving.

(Doc. No. 20, Ex. 16, p. 1)

Sharon Huston sent a separate memorandum to Kennedy, also dated November 27, 2000, listing the same concerns as those set forth in the joint memorandum. (*Id.*, p. 2)

On November 28, 2000, Kennedy issued a second written warning notice to Butt, in which Kennedy stated:

> **The following serves as a disciplinary warning:**
>
> *Violation*. (1) Wound Assessments not being done. (2) Makes out visit sheets before visits to clients. (3) Does not follow instructions, criticizes and argues with nurses. (4) Documentation isn't incomplete [sic]. (5) Time management/ unaccounted for time.

> *Follow up action taken.* (1) Results of hearing test to admin. (2) 30 day extension of probationary period to assure that [Butt] is timely and appropriate with the following: . . .
> - to do a patient admission from beginning to end appropriately, completely and timely (basis, correct ICD9 codes, etc).
> - to assess lung/heart sounds, edema, wounds and pain management with the skills of a "home care" nurse (with confidence/assurance) - focus on [illegible abbreviation – could be "Nsg."] assessment.
> - to successfully complete blood draws with no more than 2-3 sticks (if patient will allow).
> - to not take "gifts" to clients or staff
> - to phone clients the afternoon before the visit - making visits in "am" - not on the way home unless a supervisory or emergency visit is needed.
> - to return to the office each day to complete charting, orders, do updates, review schedule for next day - day to begin at 8:00.
> - to be able to put on Oasis [sic] into the computer by the end of 30 days.
>
> Failure of [Butt] to comply with the above in this 30 day time frame will result in termination of employment from Greenbelt Home Care.

(Doc. No. 10, pp. 46-47) Under "Disciplinary Action," Kennedy indicated Butt's probationary period was being extended 30 days, to December 28, 2000, and a subsequent meeting was scheduled with Butt for that date. (*Id.*)

When Kennedy met with Butt to discuss the concerns itemized in the second warning notice, Butt offered explanations for some of the concerns, and denied others. For example, in response to the claim that she filled out the Skilled Nursing Visit Notes before going to a patient's home, Butt responded:

> I prepped my sheets with names and any special duty to preform [sic]. It is [not] unusual to prep new admission chart prior to see[ing] patient. All nurses do this per order of coordinator. I never filled any findings out.

(Doc. No. 20, Ex. 18, p. 1) In response to criticism of her ability to enter information in the computer, Butt responded, "I spent many afternoons in office auditing charts and awaiting someone to orient me to computer input for Medicare payments." (*Id.*)

In her deposition, Kennedy stated she did not believe all of Butt's explanations, claiming Butt "tended to not listen to what we were saying," and "had her own agenda and essentially she had her reasons for doing what she did." (Doc. No. 10, p. 41)

Butt's employment was terminated on December 19, 2000, at 10:30 a.m. (*See* Doc. No. 10, p. 49) The reason given for Butt's termination was "performance issues," which Kennedy described as follows:

> [Butt] was not able to do a skilled nursing assessment that was complete and accurate and appropriate. She could do some assessments, but it was not something that she could do consistently every day. She was not able to complete documentation appropriately or completely. Even after being told to have - having it handed back to her to complete, it still was coming back incomplete and it was not being returned timely.
>
> She did not notify her clients of visit times. We had clients calling in asking where she was or when was she supposed to visit. It is a rule, policy, of the agency nurses that they are to let their clients know when they're going to be visiting. She did not check her schedule for changes. And even though our nurses are responsible for scheduling their own clients, for the most part they do that on a previous Wednesday or Thursday for the following week. It is going to be very necessary for them to check every day because it changes.
>
> If we have new clients that we add, if we have clients that call in and say they're going to the doctor, as an example, we cannot visit that client and get paid for it, so it's very important for the nurse to check on a daily basis, either by phone or visually look at the calendar.
>
> "Failure to consider the office economics by making p.m. and return visits to Iowa Falls in the afternoon." She was doing that and there were times and there always are times

> when clients need to be seen late in the afternoon because of other – maybe they're tied up in class or they have other happenings that are going that they need to be seen later in the day.
>
> We also have clients that need to have dressings changed. If they're being changed more than once a day, sometimes that's in the afternoon, but repeatedly we found that clients were not always – the visits were not always being made appropriately. They could have been made in the morning, but she was essentially cashing in on mileage by going back to Iowa Falls and seeing the client prior to going home.

(Doc. No. 10, pp. 43-45)

Butt responds that Greenbelt's asserted reasons for terminating her are pretextual, maintaining Greenbelt terminated her because of her age and her alleged physical disabilities. She deems the list of "concerns and observations" dated September 22, 2000, to be "an oral reprimand," and argues "8 of the 11 things listed as the reasons for the reprimand were all directly connected to either my limitations with the use of knees or legs, or connected to my hearing." (Doc. No. 20, Ex. 3, ¶ 11)

With regard to her hearing, Butt claims she discovered she had a hearing loss after she was hired by Greenbelt, an assertion that is not disputed by Greenbelt. Butt obtained a hearing test at her own expense, and provided Greenbelt with copies of the results and recommendations from that test. She purchased an amplified stethoscope herself and did not ask Greenbelt for reimbursement. She has since purchased hearing aids. (*Id.*, ¶ 12) Butt claims that with these accommodations, her hearing loss does not impair her ability to perform the essential functions of her job. (*Id.*, ¶ 13)

With regard to her knee and leg problems, Butt claims she has "a history of severe arthritis of the back, knees, and ankles, as well as knee replacements in both . . . knees." (*Id.*, ¶ 7) She claims "a long record of . . . disability with [her] knees" exists, and she

informed Greenbelt "of the fact about [her] knee replacements." (*Id.*) In her affidavit supporting her resistance to Greenbelt's motion, Butt explains:

> I use handicapped parking spaces, and have had a permanent handicapped license plate on my personal vehicle since about 1987. I cannot run, or walk at a quick pace. I cannot walk for long distances (I am not proficient at judging the length in feet or yards), and cannot bend my knees at a full 90 degree angle. When I attend sports functions, I cannot walk up the steps of the bleachers; I crawl over them one at a time until I get to a seat, because I cannot bend my knees. I also cannot bend downwards on my knees. This limitation of the functioning of my knees affects my ability to be in a stooping position, or bend to the floor on my knees. I also have difficulty getting in and out of certain makes of vehicles depending on the size of the vehicle. . . . I use handrails on stairways as a safety precaution. As a nurse, I am aware of how devastating a fall can be. I have also been advised by my physician to take care to avoid falls.

(*Id.*, ¶¶ 9 & 10)

Butt's assertion in her affidavit differs from what she told Kennedy during her job interview. Butt testified as follows in her deposition:

> Q [By Dennis W. Johnson, on behalf of Greenbelt] At that point in time did you disclose to anyone at Greenbelt Home Care any physical disabilities that you had?
>
> A [By Butt] I told [Kennedy] that I had had surgery and I had bilateral knee prosthesis. I had one done in 1986, January of 1986, and the other one done in April of 1992. It hadn't stopped my functioning at all. I have five grandsons and I got into the bleachers at every sports activity in the Hampton area, and then one grandson was at Iowa and all the Iowa football games at Iowa and all the bowl games so I hadn't –
>
> I didn't actually have any problems walking. I just was very safe and careful. Dr. Fisher had warned me about falling and things like that. So I was extra especially careful about that.

Q But you told Sheryl Kennedy –

A Yes.

Q – that you had that knee problem but that it didn't impair you?

A No.

Q Is that what you told her?

A Yes, and I told her it was apparent because I was the only RN at the Rockwell Nursing Home with two wings and 50 patients.

* * *

Q Did you advise anyone when you were hired at Greenbelt Home Care that you had difficulty walking 100 feet or 100 yards or anything like that or did you have difficulty walking?

A Yes, I told them that I did not do long walking because my knees would just get tired, but in all of the things I was doing I was walking. I would go to malls and everything but I would sit down frequently, you know. I don't know. I suppose I would walk a block and maybe sit down for a while [sic] and things like that so they were aware of that.

Q What about climbing stairs? Did you tell them that you had any problems climbing stairs?

A No, I don't have any problems climbing stairs but I was warned by Doctor Fisher if I should fall, and I knew this, that I have steel equipment in there and I could fracture a femur. It would ram a femur, the rod right through the femur, so I always used – for safety sake I used – if there was a handrail I used it just because I wanted to be careful myself, but many, many places I went there were no handrails and I went up and down.

Some of our clients were upstairs people and second floors and I would go. I always use an elevator if there is one available, and it's just that they had told me when they did it because I was only 55 years old and the youngest one that he ever did it on and one of the heaviest that it wouldn't last ten years, and it will be 17 years in January and it's the longest that they ever had a knee replacement.

(Doc. No. 10, pp. 5-6, 8-9) She further explained that she told Kennedy she had no limitations or restrictions as to lifting, and she routinely carried 100-pound parcels by herself, as well as lifting patients weighing up to 300 pounds "onto commodes and turning them and things like that." (*Id.*, pp. 7-8)

Butt argues the fact that the September 22, 2000, list of concerns included her use of handicapped parking spaces is evidence of Greenbelt's discrimination on the basis of her alleged disability related to her knees. She claims Greenbelt "does not accommodate employees who are handicapped by providing handicapped parking." (Doc. No. 19, ¶ 8, citing Kennedy's deposition, Doc. No. 20, Ex. 6, pp. 15-16) Kennedy testified Greenbelt does not encourage its employees' use of handicapped parking spaces, explaining:

> That is something that we certainly don't encourage at all. To my knowledge, we don't have other employees who have handicap stickers on their cars, but I did not know that [Butt] did. The one thing that we try and do is when we park at Cedar Ridge, as an example, or the clinic, we want to make sure that we are not taking up handicap parking spaces.
>
> We don't park – even if we are delivering blood to the clinic, we don't take up a handicapped parking space to do that because that's not our position. We need to keep those places free and clear for the clients that frequent those places or live there.

(*Id.*, pp. 15-16) Kennedy stated Greenbelt does not provide handicapped parking for its employees, noting, "If we had an employee that was handicapped, they could park upstairs in the handicap parking space and come in the front door and take the elevator downstairs, but we do not have handicap parking spaces behind the building." (*Id.*, p. 16)

Butt argues Greenbelt's failure to accommodate handicapped employees "infers [sic] that [Greenbelt] does not anticipate that handicapped persons with walking limitations would

be hired, or expect to provide any accommodation for a person with walking limitations." (Doc. No. 19, ¶ 8)

As noted above, Butt also claims Greenbelt failed to train her properly in all the aspects of her job responsibilities. (Doc. No. 1, ¶ 21) She claims that during her job orientation, Ellingson stated, "We've never hired an R.N. as old as you." (*Id.*, ¶ 14) She believes she was discriminated against by Ellingson on the basis of age, and argues Kennedy "was very rarely present in the office during late November 2000 and December 2000, [and] . . . could not have personally observed what occurred in the office." (*Id.*, ¶ 17) Butt asserts Ellingson's age discrimination was evidenced, in part, by the time Ellingson spent training Jill Silver, a much younger nurse who was hired close in time to Butt. It is undisputed that after Butt was terminated, the nurse coordinator position for the Ackley/Iowa Falls region was filled by Ms. Silver and Amy Ferris, both of whom are nurses much younger in age, and with much less experience, than Butt. (*See* Doc. No. 20, Ex. 6, p. 43)

When Butt received the written warning in October 2000, she made two separate complaints that she was not receiving adequate training and she was being harassed, and she asked "that the discrimination be remedied." (Doc. No. 1, ¶¶ 22 & 23) She claims Greenbelt failed to take any action in response to her complaints, and then "began polling patients in regards to [Butt's] care for them and falsely reported patients[']comments." (*Id.*, ¶¶ 24 & 25)

After she was terminated by Greenbelt, Butt filed discrimination claims with the EEOC and the ICRC. She received an administrative release from the ICRC on August 31, 2001, and from the EEOC on September 9, 2001. Butt points to her filing of these claims as evidence of her belief that she was discriminated against because of her disabilities and age. (Doc. No. 20, Ex. 3, ¶ 5)

III. STANDARDS FOR SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment, and provides that either party to a lawsuit may move for summary judgment without the need for supporting affidavits. Fed. R. Civ. P. 56(a) & (b). Rule 56 further states that summary judgment

> shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law*.

Fed. R. Civ. P. 56(c) (emphasis added). "A court considering a motion for summary judgment must view all the facts in the light most favorable to the nonmoving party, . . . and give [the nonmoving party] the benefit of all reasonable inferences that can be drawn from the facts." *Lockhart v. Cedar Rapids Comm. Sch. Dist.*, 963 F. Supp. 805, 814 (N.D. Iowa 1997) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)). A genuine issue of material fact is one with a real basis in the record. *Lockhart*, 963 F. Supp. at 814 n.3 (citing *Matsushita*, 475 U.S. at 586-87, 106 S. Ct. at 1355-56).

The party seeking summary judgment must "'inform[ ] the district court of the basis for [its] motion and identify[ ] those portions of the record which show lack of a genuine issue.'" *Lockhart*, 963 F. Supp. at 814 (quoting *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992)); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986). Once the moving party has met its initial burden under Rule 56 of showing there is no genuine issue of material fact, the nonmoving party, "by affidavits or as otherwise provided in [Rule 56],[5] must set forth specific facts showing that there is

[5] *E.g.*, by "affidavits . . . supplemented or opposed by depositions, answers to interrogatories, or (continued…)

a genuine issue for trial." Rule 56(e); *Lockhart*, 963 F. Supp. at 814 (citing *Matsushita*, 475 U.S. at 586, 106 S. Ct. at 1356).

Addressing the quantum of proof necessary to successfully oppose a motion for summary judgment, the United States Supreme Court has explained the nonmoving party must produce sufficient evidence to permit "'a reasonable jury [to] return a verdict for the nonmoving party.'" *Lockhart*, 963 F. Supp. at 815 (quoting *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)). Furthermore, the Court has held the trial court must dispose of claims unsupported by fact and determine whether a genuine issue for trial exists, rather than "weigh the evidence and determine the truth of the matter." *Lockhart*, 963 F. Supp. at 815 (citing *Anderson*, 477 U.S. at 249, 106 S. Ct. at 2510-11; *Celotex*, 477 U.S. at 323-24, 106 S. Ct. at 2552-53; and *Matsushita*, 475 U.S. at 586-87, 106 S. Ct. at 1355-56).

Thus, if Greenbelt shows no genuine issue exists for trial, and if Butt cannot advance sufficient evidence to refute that showing, then Greenbelt is entitled to judgment as a matter of law, and the court must grant summary judgment in Greenbelt's favor. If, on the other hand, the court "can conclude that a reasonable trier of fact could return a verdict for [Butt], then summary judgment should not be granted." *Lockhart*, 963 F. Supp. at 815 (citing *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510)

Special care must be given to summary judgment motions in employment discrimination cases. As the Honorable Mark W. Bennett explained in *Bauer v. Metz Baking Co.*, 59 F. Supp. 2d 896, 900-901 (N.D. Iowa 1999):

> The court has often stated that "summary judgment should seldom be used in employment-discrimination cases." *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994) (citing *Johnson v. Minnesota Historical Soc'y*, 931 F.2d 1239, 1244 (8th Cir.

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[5](…continued)
further affidavits." Fed. R. Civ. P. 56(e).

> 1991); *Hillebrand v. M-Tron Indus., Inc.*, 827 F.2d 363, 364 (8th Cir. 1987), *cert. denied*, 488 U.S. 1004, 109 S. Ct. 782, 102 L. Ed. 2d 774 (1989)); *see also Snow v. Ridgeview Medical Ctr.*, 128 F.3d 1201, 1204 (8th Cir. 1997) (citing *Crawford*); *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 615 (8th Cir. 1997) (quoting *Crawford*); *Chock v. Northwest Airlines, Inc.*, 113 F.3d 861, 862 (8th Cir. 1997) ("We must also keep in mind, as our court has previously cautioned, that summary judgment should be used sparingly in employment discrimination cases," citing *Crawford*); *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1264 (8th Cir. 1997) (quoting *Crawford*); *Hardin v. Hussmann Corp.*, 45 F.3d 262 (8th Cir. 1995) ("summary judgments should only be used sparingly in employment discrimination cases," citing *Haglof v. Northwest Rehabilitation, Inc.*, 910 F.2d 492, 495 (8th Cir. 1990); *Hillebrand*, 827 F.2d at 364).

Thus, summary judgment is rarely appropriate in employment discrimination cases, and should be granted only in "'those rare instances where there is no dispute of fact and where there exists only one conclusion.'" *Id.* (citing *Johnson v. Minnesota Historical Soc'y*, 931 F.2d 1239, 1244 (8th Cir. 1991); *Webb v. St. Louis Post-Dispatch*, 51 F.3d 147, 148 (8th Cir. 1995) (quoting *Johnson*, 931 F.2d at 1244); *Crawford*, 37 F.3d at 1341 (quoting *Johnson*, 931 F.2d at 1244)). Judge Bennett further explained:

> To put it another way, "[b]ecause discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant." *Crawford*, 37 F.3d at 1341 (holding that there was a genuine issue of material fact precluding summary judgment); *accord Snow*, 128 F.3d at 1205 ("Because discrimination cases often turn on inferences rather than on direct evidence, we are particularly deferential to the nonmovant," citing *Crawford[*, 37 F.3d at 1341]); *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 486 (8th Cir. 1996) (citing *Crawford*, 37 F.3d at 1341); *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) (quoting *Crawford*, 37 F.3d at 1341); *Johnson*, 931 F.2d at 1244.

Keeping these standards in mind, the court now will address Greenbelt's motion for summary judgment.

IV. LEGAL ANALYSIS

A. Butt's Disability Claims Under the ADA and the ICRA

Greenbelt argues it is entitled to summary judgment on Butt's disability claims under the ADA and the ICRA.[6] Butt argues the record supporting these claims is sufficient to withstand summary judgment.

Judge Bennett has described the analytical framework for an ADA disability claim as follows:

> To qualify for relief under the ADA, a plaintiff must establish the following: (1) that he or she is a disabled person within the meaning of the ADA; (2) that he or she is qualified[;] that is, with or without reasonable accommodation (which the plaintiff must describe), he or she is able to perform the essential functions of the job; and (3) that the employer terminated the plaintiff, or subjected the employee to an adverse decision, "because of" the plaintiff's disability.

Walsted v. Woodbury County, 113 F.3d 1318, 1326 (N.D. Iowa 2000); *see Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1016 (8th Cir. 2000).

> If a plaintiff in an ADA employment discrimination case can establish these three elements, then the burden shifts to the employer to proffer a legitimate, nondiscriminatory reason for the adverse employment action. *See McDonnell Douglas Corp.*

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[6] As Judge Bennett observed in *Walsted v. Woodbury County*, 113 F.3d. 1318, 1342 (N.D. Iowa 2000), Iowa Code section 216.6 makes it an unfair or discriminatory employment practice to "discharge" or "otherwise discriminate" against any employee "because of" a disability "unless based upon the nature of the occupation." *See* IOWA CODE § 216.6; *Sierra v. Employment Appeal Bd.*, 508 N.W.2d 719, 722 (Iowa 1993). Iowa courts look to the ADA, its regulatory interpretations, and its case law in construing a disability claim under the ICRA. *See Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 616 (8th Cir. 1997); *Fuller v. Iowa Dept. of Human Servs.*, 576 N.W.2d 324, 329 (Iowa 1998); *Probasco v. Iowa Civil Rights Comm'n*, 420 N.W.2d 432, 435 (Iowa 1988). Thus, this court's analysis under the ADA is equally applicable to Butt's disability claim under the ICRA.

> *v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). . . . Once such a reason is proffered, the burden shifts back to the plaintiff to show that the employer's stated reason is pre-textual.

Walsted, 113 F.3d at 1326-27.

Under the ADA, a "disabled person" either (1) has a "physical or mental impairment that substantially limits one or more of the [person's] major life activities[,]" (2) has "a record of such an impairment," or (3) is "regarded as having such an impairment." 42 U.S.C. § 12102(2)(A), (B), (C). In the present case, Greenbelt argues Butt is not a disabled person because she has no physical impairment that substantially limits a major life activity, she does not have a record of such an impairment, and Greenbelt did not regard her as disabled. (*See* Doc. No. 11, pp. 2-3)

Butt argues she is a disabled person within the meaning of the ADA either because she suffers from actual disabilities (*see* Doc. No. 18, pp. 8-9), she was regarded by Greenbelt as having a disability (*id.*, p. 9), or she has a record of disability (*id.*). Butt further claims she was qualified to perform the essential functions of her job either with or without reasonable accommodation. (*Id.*, pp. 9-10) Butt argues Greenbelt failed in its duty to engage in an interactive process with her to discern whether she could have been accommodated in the performance of her job. (*Id.*, p. 11) She argues further that she was treated less favorably than similarly-situated employees, raising an inference of discrimination. (*Id.*, p. 12) Finally, Butt argues a genuine issue of fact exists as to whether Greenbelt discharged her because of her alleged disabilities. (*Id.*, p. 8)

1. Was Butt a "disabled person" under the ADA?

Butt was a "disabled person" for ADA purposes if she has an actual disability, Greenbelt regarded her as disabled, or she has a record of disability. The court will examine each of these criteria in turn.

a. Does Butt have an actual disability?

Greenbelt argues Butt did not have an actual disability when she was discharged because her physical impairments did not substantially limit her ability to work. Greenbelt relies on Butt's deposition testimony in which she admitted telling Kennedy that her knee prostheses do not limit her functioning, and she denied Greenbelt had fired her because of her hearing problem. Butt responds that whether she suffers from an actual disability is a question of fact for the jury.

In *Wheaton v. Ogden Newspapers, Inc.*, 66 F. Supp. 2d 1053 (N.D. Iowa 1999), Judge Bennett explained at length the legal hurdles a plaintiff must clear in proving the existence of an actual disability:

> [T]he court must determine whether Wheaton has a present physical or mental impairment that substantially limits one or more of her major life activities. 42 U.S.C. § 12102(2)(A); *see Sutton v. United Air Lines, Inc.*, 527 U.S. 471, ____, 119 S. Ct. 2139, 2146, 144 L. Ed. 2d 450 (1999) (requiring that a person be presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability). In seeking further definition of the term "substantially limits" under the ADA, the Eighth Circuit Court of Appeals looked to the regulations implementing the ADA:
>
> > [T]he EEOC regulations state that the following factors should be considered in determining whether an individual is substantially limited in a major life activity: (i) the nature and severity of the impairment, (ii) its duration or expected

> duration, and (iii) its actual or expected long-term impact. 29 C.F.R. § 1630.2(j)(2).

Aucutt [*v. Six Flags Over Mid-America, Inc.*], 85 F.3d [1311,] 1319 (8th Cir. 1996); (other citations omitted). ADA regulations, as well as ADA interpretive guidance, make clear that temporary, minor injuries do not "substantially limit" a person's major life activities. 29 C.F.R. § 1630.2(j), 29 C.F.R. pt. 1630, App. § 1630.2(j). Also, the Supreme Court has recently held that the determination of whether an individual is substantially limited in a major life activity must take into account mitigating measures such as medicines and assistive devices. *Sutton*, 527 U.S. at ___, 119 S. Ct. at 2147.

* * *

Since the ADA does not define "major life activities," the Eighth Circuit Court of Appeals has been guided by the definition provided in 29 C.F.R. § 1630.2 of the EEOC regulations on implementation of Title I of the ADA. *Aucutt*, 85 F.3d at 1319. As the court observed in *Aucutt*:

> As defined in 29 C.F.R. § 1630.2(I), the phrase "major life activities" means "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i).

*Aucut*t, 85 F.3d at 1319; *Webber*, 186 F.3d 907, 910. Under the EEOC's interpretations of the ADA,

> "Major life activities" are those basic activities that the average person in the general population can perform with little or no difficulty. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching.

29 C.F.R. pt. 1630, App. § 1630.2(I); (citation omitted). The Eighth Circuit has also considered major life activities to include sitting, standing, lifting, and reaching. *Fjellestad [v.*

> *Pizza Hut of America, Inc.*], 188 F.3d 944[, 946 (8th Cir. 1999)].
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> * * *
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> The Equal Employment Opportunity Commission's Interpretive Guidance on Title I of the Americans With Disabilities Act, 29 C.F.R. pt. 1630, App. § 1630.2(j), provides:
>
> > [A]n impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population's ability to perform that same major life activity. Thus, for example, an individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major life activity of walking.
>
> 29 C.F.R. pt. 1630, app., 1630.2(j).

Wheaton, 66 F. Supp. 2d at 1060-62. *See Walsted v. Woodbury County, Iowa*, 113 F. Supp. 2d 1318, 1327-28 (N.D. Iowa 2000).

Using these standards, the court must determine whether Butt has presented a genuine issue of material fact as to whether either her knee condition or her hearing problem substantially limits any of her major life activities.

The court first must consider the impact of the apparent disparity between Butt's current description of her ability to walk, climb, stoop, and otherwise use her legs, and her description of her abilities at the time of her job interview by Kennedy. Chief Judge Mark W. Bennett of this court has held an eleventh-hour affidavit that contradicts prior sworn testimony cannot be used to generate a genuine issue of material fact to avoid summary judgment. *See Hog Slat, Inc. v. Ebert*, 104 F. Supp. 2d 1112, 1117-18 (N.D. Iowa 2000) (citing numerous cases on point); *accord Richards v. Farner-Bocken Co.*, 145 F. Supp. 2d 978, 1003-04 (N.D. Iowa 2001) (quoting *Hog Slat*). Judge Bennett relied, in

part, on the Eighth Circuit's holding in *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361 (8th Cir. 1983), in which the court held:

> If testimony under oath . . . can be abandoned many months later by the filing of an affidavit, probably no cases would be appropriate for summary judgment. A party should not be allowed to create issues of credibility by contradicting his own earlier testimony. The district courts should examine such issues with extreme care, and only in circumstances . . . where the conflicts between the deposition and affidavit raise only sham issues should summary judgment be granted.

Camfield, 719 F.2d at 1365-66.

"An exception to the rule may be shown where the affiant explains apparent inconsistencies or demonstrates a plausible reason for a change." *Richards*, 145 F. Supp. 2d at 1004 (citing *Camfield*, and other Eighth Circuit cases in accord). In cases where the court is not faced with an affidavit that clearly attempts to create "a ruse designed to raise an issue of fact that would entitle the plaintiff[ ] to a jury trial," *Kim v. Ingersoll Rand Co.*, 921 F.2d 197, 199 (8th Cir. 1990), there is authority for the proposition that apparently contradictory statements between a summary judgment affidavit and prior sworn testimony creates a credibility question for the jury to resolve. *Herring v. Canada Life Assurance Co.*, 207 F.3d 1026, 1031 (8th Cir. 2000) (citing *Kim, id.*). *See also Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1016 (10th Cir. 2002) ("[I]n determining whether a material issue of fact exists, an affidavit may not be disregarded because it conflicts with the affiant's prior sworn statements. . . . [H]owever, courts will disregard a contrary affidavit when they conclude that it constitutes an attempt to create a sham fact issue.")

Applying these authorities in the present case, the court must weigh Butt's deposition testimony against her summary judgment affidavit to determine whether she is attempting to create sham factual issues to avoid summary judgment. Butt told Kennedy she does not have "any problems walking," and she "just was very safe and careful." (Doc. No. 10,

Ex. 1, p. 6) She told Kennedy she "did not do long walking because [her] knees would just get tired." (*Id.*, p. 7) In her affidavit, Butt clarifies that she "cannot run, or walk at a quick pace" and "cannot walk for long distances." (*Id.*, Ex. 3, ¶ 9) These statements are not contradictory.

Butt also told Kennedy her knee prostheses have not impaired her functioning "at all," and she has been able to get into the bleachers to watch her grandsons participate in sports activities. (*Id.*, Ex. 1, p. 6) In her summary judgment affidavit, she explains further that to get into the bleachers, she is unable to walk up the steps, but must "crawl over them one at a time until I get to a seat, because I cannot bend my knees." (*Id.*, Ex. 3, ¶ 9) Again, these statements are not directly contradictory. It seems likely that Butt minimized her limitations that result from her knee prostheses to make a good impression on a prospective employer. Although these differences between her pre-employment disclosures and her summary judgment affidavit may impact upon her credibility, the court does not find Butt is attempting to raise sham issues for purposes of avoiding summary judgment.

The court finds Butt has presented evidence that raises a genuine issue of material fact as to whether her knee problems substantially limit the major life activity of walking. Butt states she has difficulty climbing stairs, walking long distances, walking quickly, stooping, bending to the floor, bending her knees at a 90-degree angle, and getting in and out of certain types of vehicles. (Doc. No. 20, Ex. 3, ¶¶ 7 & 9) She has offered documentation indicating that at one point, she qualified for Social Security disability payments due to her knee problems. (*See* Doc. No. 20, Ex. 3, ¶ 7, & Ex. 11)[7]

[7]Greenbelt argues these Social Security records, and other medical records relating to Butt's knee problems, would not be admissible at trial without an expert witness, and Butt has designated no expert witness. While these are evidentiary questions for consideration by the trial court, the undersigned notes there is no requirement under the ADA that a plaintiff offer expert testimony to substantiate a disability claim. *See Katz v. City Metal Co.*, 87 F.3d 26, 30 n.2, 32 (1st Cir. 1996) ("A plaintiff may indirectly prove that he was discriminated against because of a disability by using the *prima facie* case and burden (continued…)

Despite the fact that Greenbelt did not have information regarding the extent of Butt's knee problems at the time she was hired, it is evident that Greenbelt developed concerns regarding Butt's ability to climb stairs, walk long distances, bend over to check patients for edema, and ride in certain types of vehicles. (*See* Doc. No. 20, Ex. 17) On these facts, a reasonable trier of fact could reach different conclusions regarding whether Butt suffers from an actual disability. Because this is not one of "those rare instances where there is no dispute of fact and where there exists only one conclusion," Greenbelt is not entitled to summary judgment on this issue.

On the other hand, the court finds Butt cannot prevail on a claim that her partial hearing loss constitutes a disability for purposes of the ADA. She has offered evidence that she suffers from partial hearing loss that has been addressed by the purchase of an amplified

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[7](…continued)
shifting methods that originated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). . . (other citations omitted)." "There is certainly no general rule that medical testimony is always necessary to establish disability. Some long-term impairments would be obvious to a lay jury (*e.g.*, a missing arm) and it is certainly within the realm of possibility that a plaintiff himself in a disabilities case might offer a description of treatments and symptoms over a substantial period that would put the jury in a position where it could determine that he did suffer from a disability within the meaning of the ADA."); *United States v. City & County of Denver, Colo.*, 49 F. Supp. 2d. 1233, 1240 (D. Colo. 1999) ("[N]o rule exists that medical evidence is always necessary to show that an impairment substantially limits a claimant's ability to work.") (citing *Katz*). *See also, e.g., Lebron -Torres v. Whitehall Labs.*, 251 F.3d 236, 240-41 (1st Cir. 2001) (expert vocational testimony is persuasive, but not required, to show plaintiff is significantly restricted in her ability to perform a class of jobs or a broad range of jobs in various classes), citing *Duncan v. Washington Metro. Area Transit Auth.*, 240 F.3d 1110, 1116-17 (D.C. Cir. 2001) ("[Plaintiff] need not necessarily produce expert vocational testimony, although such evidence might be very persuasive."); *Mullins v. Crowell*, 228 F.3d 1305, 1314 n.18 (11th Cir. 2000) ("[E]xpert vocational evidence, although instructive, is not necessary to establish that a person is substantially limited in the major life activity of working. Furthermore, a plaintiff could testify from his or her own extensive job search whether other jobs that he or she could perform were available in the geographical area."). *But cf. Bleek v. Supervalu, Inc.*, 95 F. Supp. 2d 1118,1121 (D. Mont. 2000) (expert testimony required to prove causation when plaintiff alleges 100% disability due to employer's actions, and alleged injury is not one "for which laymen could plainly determine cause or permanency."); *Layton v. Yankee Caithness Joint Venture, L.P.*, 774 F. Supp. 576 (D. Nev.1991) ("[W]here a question of fact is beyond the comprehension of the ordinary lay person, expert testimony is required to prove that fact.").

stethoscope and hearing aids. Butt agrees neither she nor Greenbelt knew of her hearing loss at the time she was hired. Butt testified in her deposition that the amplified stethoscope completely solved her hearing problem, and she agreed her hearing problem was not a factor in her termination. (Doc. No. 10, pp. 23-24)

The United States Supreme Court has held, "[I]f a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures -- both positive and negative -- must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the [ADA]." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482, 119 S. Ct. 2139, 2146, 144 L. Ed. 2d 450 (1999). "A 'disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken." *Id. Accord Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 723-24 (8th Cir. 2002) (citing *Sutton*). Therefore, because Butt's partial hearing loss has been completely mitigated, it does not constitute a disability for purposes of an ADA claim. *See id*.

b. Was Butt regarded by Greenbelt as having a disability?

In her brief resisting Greenbelt's motion, Butt asserts, "A jury could find that the employer regarded Ms. Butt as disabled as the first disciplin[ary action] was direct evidence of discrimination as it was heavily focused on what [Greenbelt] viewed as limitations. Also, since Kennedy requested that Ms. Butt have a hearing test, it is obvious that Sheryl Kennedy, who is also a registered nurse, suspected that Ms. Butt had hearing difficulties." (Doc. No. 18, p. 9) This is the first time Butt has raised a claim that Greenbelt regarded her as having a disability. Nothing in Butt's Complaint even alludes to a perceived disability claim; rather, the Complaint focuses solely on Butt's claim that she was discriminated against on the basis of an actual disability.

Greenbelt has not addressed the perceived disability claim in its briefs, noting Butt "has not alleged that Greenbelt regarded her as disabled." (Doc. No. 11, p. 3) The court agrees, and finds Butt should not be allowed to proceed on a perceived disability claim.

c. Did Butt have a record of disability?

Similar to the perceived disability aspect of her case, Butt raises for the first time in response to Greenbelt's motion an argument that even if she did not have an actual disability or was not regarded by Greenbelt as having a disability, she had a record of disability and therefore was a "disabled person" for purposes of the ADA.

Because Butt failed to raise this claim in her Complaint, she should not be allowed to proceed on a record-of-disability claim. In any event, on the record before the court, Butt has failed to show Greenbelt knew of or relied upon any record evidence that she suffers from an impairment that substantially limits a major life activity. Such a showing is a requirement to prevail on a record-of-disability claim. *See Wheaton*, 66 F. Supp. 2d at 1064; 29 C.F.R. pt. 1630, app., 1630.2(k) (Plaintiff must show a record "relied on by an employer indicates that the individual has or has had a substantially limiting impairment.") Regarding Butt's knees, the only records of which Greenbelt even had knowledge would be those relating to her knee surgeries. Greenbelt had no indication it might be necessary to obtain those records based on Butt's assertion that her knee prosthetics did not limit her ability to function "at all." Regarding her hearing loss, although Greenbelt had records from the hearing test indicating Butt does suffer from some hearing loss, Butt claimed the amplified stethoscope solved her problems in that regard, and she admitted her hearing

problems were not a factor in her termination.[8] Thus, the court finds Butt has failed to demonstrate she has a "record of disability" for purposes of the ADA.

In summary, the court finds that although Butt has failed to establish a claim that Greenbelt perceived her to be disabled, or that she was discriminated against based on a record of disability, nevertheless a reasonable jury could conclude Butt has an actual disability. Therefore, for purposes of avoiding summary judgment, Butt has established the first prong of a claim for relief under the ADA. The court will, therefore, turn to consideration of the second prong of Butt's ADA claim.

2. Was Butt qualified to perform the essential functions of her job, with or without reasonable accommodation?

Butt argues she is able to perform her job with or without reasonable accommodation. (Doc. No. 18, p. 9) She argues that although she is limited in walking long distances, running, bending her knees at a 90-degree angle, and getting into or out of certain makes of vehicles, she nevertheless is capable of performing nursing assessments, and in fact is currently employed in that capacity. She claims Greenbelt refused to accommodate her "walking disability in regards to her request to use handicapped parking, and hearing deficiency," and in fact terminated her without considering reasonable accommodations for her disabilities. (*Id.*, p. 10) Greenbelt takes the position that Butt has failed to establish she has a disability, and therefore does not address this issue at all in its briefs. (*See* Doc. Nos. 11 & 22)

[8] In her deposition, Butt stated Greenbelt did not fire her because of her hearing problem "because they didn't know it and I didn't know it." She further stated the amplified stethoscope solved the problem. (Doc. No. 10, pp. 23-24)

In *Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011 (8th Cir. 2000), the Eighth Circuit described the test for determining whether a person is qualified, for ADA purposes, to perform the essential functions of a job:

> The determination of qualification involves a two-fold inquiry: (1) whether the individual meets the necessary prerequisites for the job, such as education, experience, training, and the like; and (2) whether the individual can perform the essential job functions, with or without reasonable accommodation. *See Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1111-12 (8th Cir. 1995). Although the employee at all times retains the burden of persuading the trier of fact that he or she has been the victim of illegal disability discrimination, "once the plaintiff makes 'a facial showing that reasonable accommodation is possible,' the burden of production shifts to the employer to show that it is unable to accommodate the employee." *Id.* at 1112 (quoting *Mason v. Frank*, 32 F.3d 315, 318-19 (8th Cir. 1994)).

Cravens, 214 F.3d at 1016; 42 U.S.C. § 12111(8).

Thus, to show she is "a qualified individual with a disability" for ADA purposes, Butt must show she is "'an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that [she] holds or desires.'" *Wheaton*, 66 F. Supp. 2d at 1066 (citing, *inter alia*, 42 U.S.C. § 12111(8)).

The court finds that for summary judgment purposes, Butt clearly has satisfied the first part of the two-fold inquiry (*i.e.*, she met the necessary prerequisites for the job, such as education, experience, and training). She has been employed as a registered nurse for nearly thirty years, has participated actively in professional associations, and has an impressive resume of experience and training. Therefore, the court will focus on the second part of the inquiry; *i.e.*, whether Butt could perform the essential functions of her job at Greenbelt, with or without reasonable accommodation.

On this record, Butt's alleged disabilities did not impair her ability to perform adequate nursing assessments. Although she reportedly violated policies during home visits on a couple of occasions, there is no evidence these incidents were in any way related to Butt's claimed disabilities. Further, these issues were addressed and there is no evidence Butt failed to correct these behaviors. Additionally, on this record, Butt's difficulties hearing patients' comments, and her inability to hear well enough to assess heart and lung sounds, have been addressed by hearing aids and the amplified stethoscope.

It appears from this record that very little discussion occurred between Butt and Greenbelt relating to possible reasonable accommodations for Butt's asserted disabilities. When Butt received the first list of "concerns," which included a note that she was using handicapped parking, Butt discussed the matter with Kennedy. Butt testified in her deposition that for the first three weeks of her employment with Greenbelt, she used handicapped parking spaces that were not specifically designated for patients or employees. (Doc. No. 20, Ex. 1, pp. 18-19) Although it appears Kennedy told Butt not to use handicapped parking spaces that were designated for clients or patients, Kennedy also indicated there were handicapped parking spaces available at the building that were available for Butt to use.[9] (Doc. No. 10, pp. 34-35) There is no evidence that Butt asked for permission to use, or continue to use, handicapped parking that otherwise would not be available to her.

Butt and Kennedy had one other conversation that could be construed as a request by Butt for accommodation due to disability. During her orientation, Butt spent time observing Cindy Ellingson, Sharon Huston, and Tammy VanderLoop as they made home visits to Greenbelt's clients. The first week, Butt went with VanderLoop, who "had a real large old car of her parents' that she was using," and Butt "had no problems getting in and out of it."

[9]However, it is not clear from the record whether Kennedy told Butt about the availability of the alternate handicapped parking spaces.

(Doc. No. 20, Ex. 1, pp. 11-12) The second week, Butt was supposed to go with Huston, who had a "tiny, small model car[ ]." (*Id.*, p. 12) Butt asked Kennedy if she could drive her own vehicle because she was unable to get in and out of a small car. Kennedy agreed Butt could drive her own vehicle as long as Greenbelt did not have to pay double mileage. (*Id.*)

Besides these two incidents, there is no indication Butt ever requested any kind of accommodation for her alleged disabilities, or that Greenbelt initiated any conversation regarding reasonable accommodations.

In *Cravens*, the court described an employer's obligation in this regard as follows:

> Although there is no *per se* liability under the ADA if an employer fails to engage in an interactive process, we have previously noted that, for the purposes of summary judgment,
>
> > the failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is *prima facie* evidence that the employer may be acting in bad faith. Under these circumstances, we feel a factual question exists as to whether the employer has attempted to provide reasonable accommodation as required by the ADA.
>
> *Fjellestad* [*v. Pizza Hut of America, Inc.*], 188 F.3d [944], 952 [(8th Cir. 1999)]. To establish that an employer failed to participate in an interactive process, a disabled employee must show: (1) the employer knew about the employee's disability; (2) the employee requested accommodation or assistance for his or her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodation; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith. See *id.*

Cravens, 214 F.3d at 1021 (emphasis added).

Applying this analysis to the present case, the court finds that for summary judgment purposes, Butt has satisfied the first two prongs of the test, but only by the barest of

margins. Greenbelt arguably knew about Butt's disability with regard to her knees. Butt's conversations about using handicapped parking spaces and driving her own vehicle could be construed as requests for accommodation.[10] There is not, however, any evidence in the record to indicate Greenbelt failed to make a good faith effort to accommodate Butt, or that Butt could have been reasonably accommodated but for Greenbelt's lack of good faith. On the contrary, Greenbelt granted Butt's request to drive her own vehicle rather than ride in a small car, and allowed Butt to use handicapped parking spaces that were not designated for clients. Butt never requested any type of accommodation for her hearing difficulties.

In any event, Butt was able to perform the essential functions of the job *without* reasonable accommodation. Therefore, Butt has satisfied the second prong of her ADA claim sufficiently to survive Greenbelt's motion for summary judgment.

3. Was Butt terminated because of her alleged disabilities?

Greenbelt argues Butt was not terminated because of any disability, but because she was unable to perform the job for which she was hired. Butt argues Greenbelt's explanation is pretextual, and this is an issue of material fact that must be decided by a jury. The court finds Butt has established that she has a disability for ADA purposes, and that she is able to perform the functions of the job without reasonable accommodation. Despite Greenbelt's contention that Butt was terminated for performance reasons, Butt's termination took place under circumstances that could at least raise an inference of discrimination. She has shown

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[10] In her brief resisting Greenbelt's current motion, Butt represents Greenbelt "refused to accommodate [her] walking disability in regards to her request to use handicapped parking, and hearing deficiency," and instructed her not to use the handicapped parking. (Doc. No. 18, p. 10) The record does not support this bare assertion. There is no evidence Butt ever requested any accommodation at all relating to her hearing. The record indicates Greenbelt told Butt not to use handicapped parking spaces that were designated for clients or patients, but there was other handicapped parking available to her. The record also reflects Greenbelt granted Butt's request to use her own vehicle. There is no evidence Butt requested any other type of accommodation relating to her knee problems.

Greenbelt knew of her knee problems, had expressed concerns relating directly to those problems, and then replaced her with two younger nurses, neither of whom evidenced any disabilities. On these facts, for summary judgment purposes, Butt has raised at least an inference that her termination was the result of unlawful discrimination. *See Snow v. Ridgeview Medical Ctr.*, 128 F.3d 1201, 1206 (8th Cir. 1997) (citing *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 487 (8th Cir. 1996)); *Price v. S-B Power Tool*, 75 F.3d 362, 365 (8th Cir. 1996) ("An inference of discrimination may be raised by the evidence that a plaintiff was replaced by or treated less favorably than similarly situated employees who are not in plaintiff's protected class.") Whether Butt was terminated due to a disability is a question of fact for trial.

4. Burden-shifting analysis

As discussed above, Butt has, for summary judgment purposes, established a *prima facie* case of discrimination under the ADA, by presenting sufficient questions of material fact on each of the three prongs of an ADA claim. The burden then shifts to Greenbelt to proffer a legitimate, nondiscriminatory reason for Butt's termination. Greenbelt has done so, citing Butt's poor job performance as cause for her termination. The burden therefore shifts back to Butt to show Greenbelt's explanation is merely a pretext for discrimination. Butt has raised sufficient factual questions to leave this final analysis for the jury at trial.

The court finds, therefore, that Greenbelt's motion for summary judgment should be denied as to Butt's claims under the ADA and the ICRA.

B. Butt's Age Discrimination Claims Under the ADEA and the ICRA

Greenbelt argues it is entitled to summary judgment on Butt's age discrimination claim.[11] Butt responds that her age discrimination claim presents genuine issues of fact for trial.

The ADEA makes it unlawful for employers to discriminate on the basis of an individual's age if the individual is over 40 years old. 29 U.S.C. §§ 623(a)(1), 631(a). A plaintiff may demonstrate age discrimination by either direct or indirect evidence. *Montgomery v. John Deere & Co.*, 169 F.3d 556, 559 (8th Cir. 1999); *Beshears v. Asbill*, 930 F.2d 1348, 1353 (8th Cir. 1991). The appropriate analysis for ADEA cases where, as here, there is no direct evidence of age discrimination, is the burden-shifting framework the Supreme Court developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). *See Thomas v. First Nat'l Bank of Wynne*, 111 F.3d 64, 66 (8th Cir. 1997) ("This mode of analysis, while developed in the Title VII context, applies with equal force to ADEA cases."); *see generally Ryther v. KARE 11*, 108 F.3d 832, 835-37, 844 (8th Cir.1997) (*en banc*).

The Eighth Circuit described this burden-shifting analysis in the context of age discrimination cases in *Berg v. Bruce*, 112 F.3d 322 (8th Cir. 1997):

> Under this analysis the plaintiff has the initial burden of establishing a *prima facie* case of discrimination, which "creates a presumption that the employer unlawfully discriminated against the employee." *Burdine*, 450 U.S. at 254, 101 S. Ct. at 1094. The burden of production then shifts to the employer to rebut the presumption by producing evidence showing a legitimate non-discriminatory reason for its action.

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[11] Although Butt has brought age discrimination claims under both the ADEA and the ICRA, the court's analysis under the ADEA is determinative of both claims. *See* footnote 6, *supra*.

> *Id.* at 253, 101 S. Ct. at 1093-94. If the defendant carries this burden, the burden shifts back to the plaintiff to show that the employer's proffered reason is merely a pretext for discrimination. *Id.* The plaintiff retains the burden of persuasion at all times and accordingly the plaintiff must present sufficient evidence to persuade the trier of fact that the adverse employment action was motivated by intentional discrimination. *Id.*
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> * * *
>
> To establish a prima facie case of age discrimination under *McDonnell Douglas*, a plaintiff must prove that (1) he was in the age group protected by the Age Discrimination Act (40 or older, 29 U.S.C. § 631); (2) at the time of his discharge or demotion he was performing his job at a level that met his employer's legitimate expectations; (3) adverse employment action occurred; and (4) following his discharge or demotion, plaintiff was replaced by someone with comparable qualifications. *See Hutson v. McDonnell Douglas*, 63 F.3d 771, 776 (8th Cir. 1995) (quoting *Bashara v. Black Hills Corp.*, 26 F.3d 820, 823 (8th Cir. 1994)); *see also O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, ___ - ___, 116 S. Ct. 1307, 1309-1310, 134 L. Ed. 2d 433 (1996) (outlining elements of *prima facie* case for claims of race discrimination and age discrimination).
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> * * *
>
> The burden then shift[s] to the defendants to show a legitimate non-discriminatory reason for terminating [the plaintiff]. . . . The burden then shift[s] back to [the plaintiff] to show that the defendants' assertion that [the plaintiff] was terminated for cause was a pretext to cover age discrimination. To defeat the motion for summary judgment, [the plaintiff is] required to "set forth specific facts showing that there is a genuine material issue [regarding age discrimination] that requires a trial." *Roxas v. Presentation College*, 90 F.3d 310, 315 (8th Cir. 1996).

Berg, 112 F.3d at 326-27; *see Bauer*, 59 F. Supp. 2d at 906-09.

Butt was 69 years old when she was terminated, and thus was in the age group protected by the ADEA. She suffered adverse employment action, and subsequently was replaced by younger individuals with less training and experience than she has. However, Greenbelt argues that at the time of her discharge, Butt was not performing her job at a level that met Greenbelt's legitimate expectations. Butt responds that the reason for her substandard performance was Greenbelt's failure to train her properly, a failure Butt attributes to discrimination due to her age.

On this record, Butt has failed to present affirmative evidence that Greenbelt's asserted reasons for her termination were a pretext to cover age discrimination. Butt testified no one made negative comments about her age except Cindy Ellingson, on one occasion. (Doc. No. 10, p. 17) On two occasions, Kennedy stated she did not care about Butt's age. (*Id.*, p. 18) Butt is unable to point to anything beyond her subjective belief to show Ellingson and other Greenbelt employees discriminated against her on the basis of her age. She has failed to present direct evidence demonstrating "a specific link between the challenged employment action and the alleged animus." *Kells v. Sinclair Buick-GMC Truck, Inc.*, 210 F.3d 827, 835 (8th Cir. 2000); *see Bauer*, 59 F. Supp. 2d at 909. She similarly has presented no circumstantial evidence giving rise to an inference that age was a factor in her termination. The record does not suggest a genuine, material issue of fact exists regarding age discrimination. Accordingly, Greenbelt should be granted summary judgment on this claim.

C. Butt's Retaliatory Discharge Claim

Butt claims Greenbelt fired her in retaliation for her complaints that she was being discriminated against. (Doc. No. 1, ¶ 45) A similar claim was made by the plaintiff in *Buettner v. Arch Coal Sales Co.*, 216 F.3d 707 (8th Cir. 2000), in which the plaintiff claimed her employer had fired her in retaliation for expressing her belief that the employer

had engaged in discriminatory acts. The court explained the requirements for a plaintiff to establish a *prima facie* case of retaliation, as follows:

> Title VII of the Civil Rights Act of 1964, 42 U.S.C.§ 2000e-3, makes it unlawful for an employer to discriminate against an employee, for among other things, "because [s]he has opposed any practice made an unlawful employment practice by this subchapter." In the absence of direct evidence of discrimination, the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to claims of retaliation. *See Womack v. Munson*, 619 F.2d 1292, 1296 (8th Cir. 1980); *see also Cobb v. Anheuser Busch, Inc.*, 793 F. Supp. 1457, 1489 (E.D. Mo. 1990). Under the burden-shifting analysis, the plaintiff must first establish a prima facie case of retaliatory discrimination. *See McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. 1817. To establish a prima facie case of retaliatory discrimination, a plaintiff must show: (1) she engaged in activity protected by Title VII; (2) an adverse employment action occurred; and (3) a causal connection existed between participation in the protected activity and the adverse employment action. . . .
>
> Once the plaintiff establishes a prima facie case of retaliation, the burden shifts to the employer to produce some legitimate, non-discriminatory reason for the adverse action. *See Womack*, 619 F.2d at 1296. If the employer satisfies this burden, the plaintiff must prove the proffered reason is a pretext for retaliation. *See id.* Ultimately, the plaintiff must establish the employer's adverse action was based on intentional discrimination. *See Ryther v. KARE 11*, 108 F.3d 832, 837-38 (8th Cir. 1997) (en banc) (applying the *McDonnell Douglas* burden shifting analysis in an age discrimination case).
>
> A finding of unlawful retaliation, however, is not conditioned on the merits of the underlying discrimination complaint. *See generally Davis v. State Univ. of New York*, 802 F.2d 638, 642 (2d Cir. 1986). Title VII's prohibition against retaliatory discrimination protects activities ranging from filing a complaint to expressing a belief that the employer has engaged in discriminatory practices. *See, e.g., Wentz v.*

> *Maryland Casualty Co.*, 869 F.2d 1153, 1154-55 (8th Cir. 1989) (applying the approach taken under Title VII to claim of retaliatory discharge under the Age Discrimination in Employment Act). A plaintiff need not establish the conduct which she opposed was in fact discriminatory but rather must demonstrate a good faith, reasonable belief that the underlying challenged conduct violated the law. *See id*. at 1155.

Buettner, 216 F.3d at 714.

Addressing the first prong of Butt's *prima facie* case for retaliation, the statutorily protected activity in which Butt claims she engaged was the making of "complaints about discrimination." (Doc. No. 1, ¶ 45) Butt testified in her deposition that she complained of discrimination when she was presented with the list of Greenbelt's "concerns" on September 22, 2000. She told Kennedy the majority of the items on the list "were discriminatory accusations" relating to her disabilities. (Doc. No. 20, Ex. 1, p. 38) She claims that "from then on[,] the retaliation began and the way they did it was to go to nursing skills and care of patients." (*Id.*, p. 37) Viewing the evidence in the light most favorable to Butt, the court finds a jury could find that she had a good faith, reasonable belief that she was disciplined due to a disability, in violation of the law.

Addressing the second prong of Butt's retaliation claim, her termination "unquestionably constitutes adverse employment action." *See Buettner*, 216 F.3d at 715.

Butt's most difficult hurdle here involves the third prong of her *prima facie* retaliation claim. Greenbelt argues even assuming Butt's complaints constitute a protected activity, Butt has failed to present evidence of a causal connection between her complaints and her termination. "The requisite causal connection may be proved circumstantially by showing the discharge followed the protected activity so closely in time as to justify an inference of retaliatory motive." *Buettner*, 216 F.3d at 715-16 (citing *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1090 (8th Cir. 1992)). In this case, Butt's termination occurred within 90 days from the time she voiced her complaints concerning discrimination. However, this

temporal proximity, standing alone, is insufficient to establish the requisite causal connection. As the *Buettner* court explained:

> Generally, however, more than a temporal connection between protected activity and an adverse employment action is required to show a genuine factual issue on retaliation exists. *See Kiel [v. Select Artificials, Inc.,]* 169 F.3d [1131,] 1136 [(8th Cir. 1999) (en banc)]; *see also, e.g.*, *Feltmann v. Sieben*, 108 F.3d 970, 977 (8th Cir. 1977) (in Title VII retaliatory discharge claim[,] plaintiff fired six months after the complaint; without more, temporal proximity found to be insufficient to show causal link) [footnote omitted]; *Nelson v. J.C. Penney Co., Inc.*, 75 F.3d 343, 346-47 (8th Cir. 1996) (plaintiff fired a month after he filed age discrimination charge failed to establish causal link without evidence in addition to temporal proximity); *Caudill v. Farmland Indus., Inc.*, 919 F.2d 83, 86-87 (8th Cir. 1990) (closeness in time between plaintiff's filing of charges and plaintiff's discharge was a mere "slender reed of evidence"; any conclusion of temporal proximity would be "rank speculation"). [Footnote omitted.]

Buettner, 216 F.3d 716.

Butt argues her complaints of discrimination were followed by disciplinary actions that were pretexts for retaliation against her due to her complaints. The plaintiff in *Bassett v. City of Minneapolis*, 211 F.3d 1097 (8th Cir. 2000), similarly claimed she was targeted for discipline in retaliation for her complaints of racial discrimination. The court in that case found the evidence that Bassett was "sharply reprimanded for minor workplace rule infractions, denied personal requests granted to other specialists, and secretly taped by [a superior] when she talked with [the superior] on the phone" was sufficient, together with the temporal proximity of Bassett's discharge, to raise a question of fact as to whether her discharge was predicated upon racial discrimination. *Id.*, 211 F.3d at 1107.

Butt's claim that the disciplinary actions against her were retaliatory in nature do not appear to be supported by anything other than her own subjective belief. However, the

temporal proximity of those disciplinary actions to Butt's discrimination complaints is sufficient to raise at least an inference of retaliation. Among other things, the court notes that although Greenbelt characterized the September 22, 2000, list of concerns as non-disciplinary, Kennedy referred to her conversation with Butt about those concerns as "verbal counseling," which makes up a part of Greenbelt's progressive disciplinary procedures leading to an employee's termination. Kennedy testified as follows in her deposition:

> Q [By Ms. Foster-Smith, on behalf of Butt] What are your steps for disciplining an employee?
>
> A [By Ms. Kennedy] We use a progressive action policy whereby we deal with the problem and as each step – we have essentially three primary steps: the initial verbal warning, the written warning and the final warning. We go through a process of not only producing the paperwork and the evidence behind the discretion, whatever it happens to be, but we also work with the client to establish a plan as to how we can correct that, how we can make a change.

(Doc. No. 20, Ex. 6, p. 11) The form Greenbelt uses for written warning notices provides spaces for five "Level[s] of Counseling," including "Verbal Counseling," "Written Counseling," "First Warning," "Second Warning," and "Third Warning." (*See, e.g.*, *id.*, Ex. 19, p. 1)

On the bottom of the September 22, 2000, list of concerns, Kennedy noted she had reviewed the list with Butt on September 25, 2000, and she would "continue to monitor these areas with [Butt] during 6 mos. probationary period." (*Id.*, Ex. 17) Kennedy's September 25th discussion with Butt is listed on the subsequent written warning notices on the space provided for "Verbal Counseling." (*Id.*, Ex. 19, pp. 1 & 2) This lends credence to Butt's claim that the list of concerns, which included several items relating to Butt's disabilities, was actually a disciplinary notice.

The court finds, therefore, that Butt has made out a *prima facie* case of retaliation, shifting the burden to Greenbelt to proffer a legitimate, non-discriminatory reason for Butt's

termination. Greenbelt claims Butt was terminated due to her "past and present inadequacies" and "unsatisfactory performance." (Doc. No. 11, p. 8, citing *Jackson v. St. Joseph State Hosp.*, 840 F.2d 1387, 1391 (8th Cir. 1988)) Therefore, the burden shifts back to Butt to show Greenbelt's proffered reasons were a pretext for illegal retaliation. (*See id.*)

On this record, there is conflicting evidence regarding whether Butt was actually an unsatisfactory employee, or whether she was targeted because of her complaints that she was being discriminated against. It appears many of the reasons cited by Greenbelt for Butt's termination could have been remedied by adequate training, which Butt claims was denied her by Greenbelt's management. This "casts doubt on the veracity of the alleged nondiscriminatory reason proffered by [Greenbelt]." *See Bassett*, 211 F.3d at 1109. The *Bassett* court formulated the ultimate question on summary judgment to be "whether [the plaintiff's] theory is substantiated by the record such that a jury can find, based upon the proof of the elements of the prima facie case and evidence of pretext as to the [employer's] claim of poor job performance, that intentional discrimination is proven." *Id*. As in *Bassett*, the court finds the resolution of this question, at this summary judgment stage, is based on disputed issues of material fact that should be resolved by a jury. Therefore, the court finds Greenbelt's motion should be denied as to Butt's retaliation claim.

IV. CONCLUSION

Based upon the foregoing analysis, **IT IS RECOMMENDED**, unless any party files objections[12] to the Report and Recommendation in accordance with 28 U.S.C. § 636

[12]Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in (continued...)

(b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that Greenbelt's motion for summary judgment (Doc. No. 8) be **granted** with respect to Butt's age discrimination claim, and **denied** with respect to her disability discrimination and retaliation claims.

IT IS SO ORDERED.

DATED this 28th day of February, 2003.

_____

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

(...continued)
waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).